In The

Supreme Court of the United States

October Term, 1976

No. 76-899

McGRAW-EDISON COMPANY,

Petitioner,

v.

BETTY SOPER and JEFFSON INDUSTRIES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on September 29, 1976, and on which a Rehearing and Rehearing En Banc were denied on November 15, 1976.

OPINION BELOW

The Opinion of the Eighth Circuit Court of Appeals is reported in 542 F. 2d 1336 and is printed in Appendix A. The pertinent portions of the judgments of the District Court for the Western District of Missouri, Western Division and the pertinent portions of its Findings of Facts and Conclusions of Law are printed in Appendix B.

JURISDICTION

Jurisdiction to review the judgment below by Writ of Certiorari is conferred by 28 U. S. C., Section 1254 (1). Jurisdiction of the Trial Court was based upon 15 U. S. C., Section 1 and 28 U. S. C., Sections 1332 and 1337.

QUESTIONS PRESENTED

1. Whether the licensing of a Franchised name in connection with the sale of a "package" dry cleaning store is a *per se* violation of the Sherman Act and automatically illegal without the need of further inquiry as to whether any unreasonable competitive effects result.

2. Whether a violation of the Sherman Act under the *per se* doctrine can be predicated on the licensing of a Franchised name whose only relationship to the equipment being sold is an advertising and promotional program.

3. Whether a violation of the Sherman Act can be shown in the absence of evidence of individual coercion.

4. Whether, a sale of an existing facility including equipment and the right to use a Franchised name constitutes an illegal sale in violation of the Sherman Act.

STATUTES INVOLVED

The statutory provisions involved in this appeal are found in 15 U. S. C. Sections 1 and 15 (Supp. V, 1975), the pertinent parts of which are as follows:

Section 1. "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal * * *"

Section 15. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee * * *."

STATEMENT OF THE CASE

In this action, Respondents as Intervenors sued Petitioner in the Trial Court for damages, *inter alia*, for violations of Section 1 of the Sherman Act. Judgments on

the verdicts for the Intervenors were sustained by the Eighth Circuit Court of Appeals.

The rulings of the Trial Court as sustained by the Eighth Circuit Court of Appeals were to the effect that the sale of a dry cleaning store which included all equipment, complete operating instructions, an on-going advertising and promotional program and management assistance and use of a Franchise name, constituted a *per se* violation of Section 1 of the Sherman Act without the necessity of proof of individual coercion or proof of an unreasonable restraint on competition or without the necessity of inquiry into whether the sale in fact increased or decreased overall competition.

Statement of the Facts

In 1964, Cleaning Center Sales (later called A. P. Cleaning Center Sales or A. P. C. C. S.) a sales organization of American Laundry Machinery Industries, a division of the Petitioner, contracted with Robsbur, Inc., an agency of Arnold Palmer, a well-known golfer, to license his name and utilize his appearances in the promotion and sale as a "package" of complete one-hour dry cleaning stores. The "package" in addition to the use of the Arnold Palmer name and his continuing promotional activities included all things other than materials and supplies necessary to operate, including dry cleaning machinery, (manufactured not only by a division of Petitioner but by other manufacturers), a leased Sign and Back Drop

with Arnold Palmer's name thereon and all furniture and fixtures, complete operating instructions and other items required to start up in business.

From 1964 through 1971, approximately 400 "package" stores, including those involved in this litigation, were sold.

A. P. C. C. S.'s dealer in the Kansas City area, John R. Jacobson, had owned and operated and sold cleaning establishments under other trade names long prior to becoming a dealer for A. P. C. C. S., and in 1965 owned and operated seven dry cleaning establishments having no connection with A. P. C. C. S.

In 1965 and 1966, Jacobson purchased three "package" A. P. Cleaning Centers, and in each case executed in his own name a lease of the real estate, a Franchise Agreement, a Sign and Back Drop Agreement and a Conditional Sales Contract for the purchase of the equipment and paid sales tax on the purchases.

The A. P. Cleaning Center bought in December 1965 was operated until November 1968 when it was sold as a going business to Respondent Soper's husband who received a Bill of Sale (covering additional equipment not included in the original "package"), a Bulk Sales Affidavit, and an assignment of the real estate lease. Soper's husband subsequently on March 1, 1969, assumed the remaining lease and franchise payments and the unpaid portion of Jacobson's Conditional Sale Contract.

Jacobson operated the two other stores from November 1965 and November 1966 until he sold them as going

businesses to Respondent, Jeffson Industries, Inc. in January of 1969 and in August, 1969.

In each sale to Jeffson Industries, Inc. all documents refer to Jacobson as owner; each Bill of Sale included equipment in addition to that included in the original "package" and in each case Jeffson Industries, Inc. several months later assumed the remaining payments due on the Franchise, Sign and Back Drop Leases, and the unpaid balance of the Conditional Sales Contract debt. At the time of such sales, Jacobson was also the President and half owner of Jeffson Industries, Inc.

During the period he held title individually, Jacobson paid all the expenses, took all the depreciation, retained all the income and absorbed all the operating losses. In selling the stores, Jacobson retained all the profit on the sales.

The Respondents, as Intervenors, sued Petitioner for fraud and misrepresentation, violation of the Anti-Trust Laws and for punitive damages, arising out of the sales of these "package" stores on the theory that Petitioner's dealer was at all times Petitioner's agent and that Petitioner was bound by the agent's statements and representations and that the sales of the operating businesses were the sales of the Petitioner and involved a tying arrangement that violated Section 1 of the Sherman Act.

No evidence was presented that either Respondent Jeffson Industries, Inc. or the husband of Respondent Soper, was compelled to accept "the tie" and was not in truth attracted by the "going-business" aspects of the franchise package.

The Trial Court permitted the Jury to determine that an agency existed and to award verdicts of varying amounts on the several counts.

On the anti-trust counts submitted to the Jury, Respondent Soper received a verdict of $10,000.00. Respondent Jeffson Industries, Inc. received a verdict of $52,000.00. The Trial Court entered judgments on the anti-trust verdicts to Respondent Soper of $10,000.00 trebled to $30,000.00 plus $36,200.00 attorney's fees and to Respondent Jeffson Industries, Inc. $52,000.00 trebled to $156,000.00 plus attorney's fees of $54,300.00.

The Eighth Circuit Court of Appeals sustained the rulings of the United States District Court of the Western District of Missouri, holding that a *per se* violation of the Sherman Act existed which in effect required no further determination as to the issue of coercion in the individual case, or as to the unreasonableness of any restraint, or as to whether or not competition was actually increased or decreased by reason of the existence of such stores.

Rehearing and rehearing en banc were requested and denied.

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REASONS FOR GRANTING THE WRIT

I.

If the licensing of the use of the name of "Arnold Palmer" is a "tying product", the resultant "tying arrangement" does not necessarily unreasonably restrain competition.

Having found a tying arrangement, the Court below states that from this fact flows an inevitable hurt to competition in the tied product market and therefore is a *per se* violation of the Sherman Act.

But other Circuits require "a case by case inquiry under the 'rule of reason' to determine the competitive effects of such restraints if the Sherman Act is to be effectuated". *GTE Sylvania Incorporated v. Continental T.V. Inc.*, 537 F. 2d 980 (9th Cir. 1976).

Such a holding forecloses inquiry into whether the need for "the protection of goodwill as embodied for example in a valuable trademark may justify an otherwise invalid tying arrangement". *Susser v. Carvel Corporation,* 332 F. 2d 505 (2nd Cir. 1964).

II.

A violation of the Sherman Act under the per se doctrine cannot be predicated on the licensing of a franchised name having no prior relationship to the equipment.

The use of the "Arnold Palmer" name is so intertwined with the other elements of the "package" sale of a one-hour dry cleaning store that it cannot be so separate

and distinct a marketable item as to qualify as a "tying product" in a tying arrangement violating the Sherman Act, contrary to the holding of the Court below.

Prior to the inauguration of the A. P. Cleaning Store Program, the name "Arnold Palmer" had no automatic association with dry cleaning and no market penetration in the dry cleaning equipment field. While well known in golfing circles the Arnold Palmer name had value in selling dry cleaning equipment only as it was advertised and promoted as a part of the program incorporated in the "package" form in which it was offered. The Petitioner's contract with Robsbur, Inc. gave Petitioner the use and control of the name but limited Petitioner's power to relicense the name for use only as a part of the "package".

No buyer of dry cleaning equipment would find it of value except as promoted and advertised in an expensive campaign which under the contract with Robsbur, Inc. was limited to the arrangements made in the "package".

The franchise name has no value independent of the advertising program with which it is associated.

See *Fortner Enterprises, Inc. v. U. S. Steel Corp.,* 523 F. 2d 961 (6th Cir. 1975), cert. granted, 96 S. Ct. 1100.

III.

If the licensing of the use of the Arnold Palmer name is a "tying product", the resulting "tie" is not a violation of the Sherman Act in the absence of proof of individual coercion.

No evidence was offered in behalf of either of the Respondents that they were coerced into buying the so-called "tying product", the Franchised name.

Other circuits have held that evidence of coercion of each franchisee is required to substantiate a violation of the Sherman Act. *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F. 2d 1211, (3 CCA-1976). *Response of Carolina Inc. v. Leasco Response*, 537 F. 2d 1307 (5th Cir. 1976).

Neither Soper's husband nor Jeffson Industries, Inc. ever questioned if they could purchase the franchise without the equipment; nor does it make sense to think they would since each was buying an established business.

IV.

A sale of a preexisting facility including equipment and a franchise name does not constitute an illegal tie.

Both Respondents purchased their stores two to three years after the original opening. They did not ask for or receive new Franchise Agreements or new Sign and Back Drop Leases which would have provided for a new five-year term. On the contrary, they assumed the remaining term of each as any purchaser from any non-dealer owner elsewhere would do.

Such a sale does not constitute an illegal transaction. *Beefy Trail, Inc. v. Beefy King International, Inc.*, 348 F. Supp. 799 (M.D. Fla. 1972). This well considered and widely quoted case from a District Court in the Fifth Circuit is contrary to the position taken by the Eighth Circuit.

CONCLUSION

The Writ of Certiorari should be granted to resolve the conflicts between the circuits as to the issues raised in the Petition and to inhibit the further extension of a rule of law which seems to lessen rather than increase economic competition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Malcolm D. Young, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari on counsel for Respondents, by depositing same in the United States mail, postage prepaid, on December 28, 1976, addressed to Joseph A. Sherman and Paul A. Wickens, Suite 820, Home Savings Building, 1006 Grand Avenue, Kansas City, Missouri 64106 and upon Sheridan Morgan, Two Crown Center, Suite 400, 2420 Pershing Road, Kansas City, Missouri 64108, counsel for Respondents.

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APPENDICES A AND B

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

James E. Northern and Shirley Northern,

Plaintiffs-Appellees,

vs.

McGraw-Edison Company,

Defendant-Appellant,

Betty Soper and Jeffson Industries, Inc.,

Intervenors-Appellees.

No. 75-1738

Submitted April 16, 1976

Decided Sept. 29, 1976

Rehearing and Rehearing En Banc

Denied Nov. 15, 1976

Before GIBSON, Chief Judge, ROSS and HENLEY, Circuit Judges.

GIBSON, Chief Judge.

Defendant, McGraw-Edison Company (McGraw), appeals from a judgment entered by the District Court[1] upon a jury verdict in favor of plaintiffs James and Shirley Northern (Northern), Betty Soper and Jeffson Industries, Inc. (Jeffson),[2] on various antitrust and fraud claims.

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1 The Honorable Elmo B. Hunter, United States District Judge for the Western District of Missouri.

2 The initial complaint in this action was filed against defendant by plaintiff Northern on December 29, 1971. Betty Soper's motion to intervene pursuant to Fed. R. Civ. P. 24(b) was granted on July 31, 1972. Jefferson was permitted to intervene as plaintiff on September 6, 1972.

This litigation arose out of the sale to plaintiffs of four Arnold Palmer Cleaning Centers (A. P. Centers), which were distributed by defendant through its dealer, John Jacobson.[3] Northern and Soper each purchased one of the A. P. Centers and Jeffson purchased two.

Plaintiffs' individual complaints sought a judgment against defendant on three counts. Count I alleged that defendant violated § 3 of the Clayton Act, 15 U. S. C. § 14 (1970), and § 1 of the Sherman Act, 15 U. S. C. § 1 (Supp. V, 1975), by distributing A. P. Centers pursuant to an illegal tying arrangement in which the purchaser was obligated to purchase equipment and incidental materials from defendant in order to secure the A. P. Center franchise and "Arnold Palmer" trademark.[4] Count II alleged that defendant and Jacobson made certain misrepresentations to induce plaintiffs to purchase the A. P. Centers and that plaintiffs were entitled to actual damages for economic injury sustained due to these false statements. Count III alleged that the misrepresentations in Count II were made willfully and maliciously and that plaintiffs were entitled to punitive damages.

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3 There were actually five separate A. P. Center purchases initially involved in this case. However, as to the purchase by Jeffson of the A. P. Center at Noland Plaza Shopping Center in Independence, Missouri, the jury awarded no monetary relief. Therefore, the facts surrounding the purchase of the Noland Plaza store will not be discussed in this opinion.

4 Plaintiffs also alleged that defendant practiced price discrimination in the distribution of the A. P. Center franchises in violation of the Robinson-Patman Act. 15 U. S. C. §§ 13, 13a (1970). However, this claim was not submitted to the jury and we have no occasion to discuss it on this appeal.

In order to better comprehend the nature of the case, it is beneficial to initially review the relationship between Jacobson and defendant, to consider the activities of Jacobson preceding the sales of the A. P. Centers to the plaintiffs and to discuss the method of distributing A. P. Centers utilized by defendant. Thereafter, each plaintiff's case will be segregated and the facts relating to each purchase summarized.

In 1965 Jacobson, who maintained interests in various dry cleaning operations, attended a National Institute of Dry Cleaners convention. At that convention he met with two representatives of the Arnold Palmer Cleaning Center Sales Division (A. P. C. C. S.), which was the division responsible for distributing A. P. Centers on defendant's behalf. After extolling the economic virtues of a dry cleaning franchise identified with the name of Arnold Palmer, the representatives induced Jacobson to become an authorized dealer of A. P. Centers. Following his execution of the dealership agreement, Jacobson attended numerous indoctrination meetings with A. P. C. C. S. personnel, where he was advised of how to sell, promote and advertise A. P. Centers. He was also instructed on how to fill out the various forms which had been printed by A. P. C. C. S. and which were required to be used in consummating the sales of A. P. Centers. In addition to providing Jacobson with printed sales forms, A. P. C. C. S. forwarded catalogs, machinery price lists, site evaluation forms, financial projection forms for prospective franchisees, advertising manuals, dealer memoranda and periodic newsletters to Jacobson.

Armed with his training and promotional materials, Jacobson proceeded to sell A. P. Center franchises to in-

terested investors. Favorable locations for A. P. Centers were hard to find and, since a dealer had not always secured a willing buyer of a franchise when a good location became available, A. P. C. C. S. encouraged Jacobson and other dealers to utilize a purchase-resale procedure as a method of distributing A. P. Centers. Pursuant to this procedure, a dealer would select a favorable location for an A. P. Center and secure confirmation of his selection from A. P. C. C. S. Upon confirmation, the dealer would personally execute a lease for the location. The dealer would then enter into a franchise agreement with A. P. C. C. S., which authorized the dealer to use the name "Arnold Palmer" in association with the dry cleaning business for a period of five years. Finally, the dealer would execute a Sign and Back Drop Lease Agreement with A. P. C. C. S. which permitted the dealer to place a large "Arnold Palmer Cleaning Center" sign on the exterior of the building and to use a specially designed back drop in the interior. The dealer would also arrange to make the A. P. Center operational by purchasing all equipment from A. P. C. C. S. at dealer's cost. In most instances, the dealer would finance the equipment purchase through Edison Acceptance Corporation (E. A. C.), which, like A. P. C. C. S., was a subsidiary of defendant McGraw.

The dealer would thereafter attempt to sell the A. P. Center as a "package deal" to prospective franchisees. If such a sale were arranged, the dealer and the franchisee generally executed three documents: (1) an assignment of the lease on the location from the dealer to the franchisee; (2) an assignment of the Sign and Back Drop Lease Agreement with A. P. C. C. S. from the dealer to

the franchisee; and (3) an Assumption Agreement by which, upon E. A. C. approval, the franchisee would secure rights to the A. P. Center equipment by taking over the dealer's payments to E. A. C. A dealer would negotiate for the highest price obtainable when marketing A. P. Centers in this fashion. The dealer would be entitled to any profit secured from the sale.

In three of the four A. P. Centers involved in this litigation, Jacobson utilized this purchase-resale procedure. Of these three, one was sold to plaintiff Soper's husband and two were sold to plaintiff Jeffson. The fourth A. P. Center, purchased directly by Northern, had not previously been rendered operational by Jacobson, nor had Jacobson become a franchisee for that Center. Each of these sales will be discussed below in relation to the individual plaintiff's case.

A. *Northern v. McGraw-Edison Company.* The litigation as to Northern arose out of the purchase of an A. P. Center in Raytown, Missouri. Northern was an architect who became interested in a dry cleaning operation for investment purposes. Northern contacted Jacobson, who showed Northern a potential Raytown location. Jacobson also completed for Northern's benefit a Financial Projection Form, which had been printed by A. P. C. C. S. and which reflected that Northern could anticipate a monthly income in excess of $1,000 from the A. P. Center. Northern eventually agreed to become a franchisee and he and Jacobson executed a lease for the Raytown location. Northern signed the A. P. C. C. S. franchise agreement, as well as the Sign and Back Drop Lease agreement, on June 28, 1967. Northern was informed by Jacobson on numer-

ous occasions that in order to obtain the franchise, the franchisee must purchase the whole equipment package. Furthermore, the franchise and equipment were billed as a package item. No detailed or listed price was invoiced for the separate items making up the package. Accordingly, the package of equipment was sent by A. P. C. C. S. to Jacobson, who in turn sold the equipment to Northern for approximately $30,000.

At trial in the District Court, Northern's Count I claim that defendant's mode of distribution constituted an illegal tying arrangement was dismissed.[5] On the Count II misrepresentation claim, Northern was awarded $15,000 by the jury. Northern also received a $100,000 award of punitive damages pursuant to Count III.

B. *Soper v. McGraw-Edison Company.* Soper's claim emanates from the purchase by her husband of an A. P. Center in Liberty, Missouri. This Liberty A. P. Center was purchased from Jacobson pursuant to the purchase-resale distribution procedure outlined above. Jacobson had become the franchisee of the Liberty store in December, 1965. He purchased the equipment for the store from A. P. C. C. S. at dealer's cost and financed the purchase through E. A. C. Jacobson then sold the Liberty A. P. Center to Soper's husband on October 10, 1968. The parties then executed an assignment of the franchise agreement and the Sign and Back Drop Lease agreement. Also,

5 While the record is not clear on this subject, it appears that Northern's antitrust claim was dismissed as being untimely filed. Northern's purchase of the Raytown A. P. Center was essentially consummated on June 28, 1967. Therefore, the filing of the complaint on December 29, 1971, was not timely in light of the four year statute of limitation contained in 15 U. S. C. § 15b (1970).

Soper's husband assumed Jacobson's E. A. C. obligation. Soper's husband died in 1970 and Soper operated the store until it was eventually sold on December 31, 1972. At trial Soper obtained a jury award of $10,000 on her Count I antitrust claim (trebled to $30,000 by the court), $8,000 for fraud, $100,000 in punitive damages on Count III and attorneys' fees of $36,200.

C. *Jeffson v. McGraw-Edison Company.* In 1963 Jacobson and Roy Jeffress organized and incorporated Jeffson Industries, Inc., for the purpose of establishing a chain of coin-operated car washes. In late 1966 the principals of Jeffson decided that Jeffson should diversify and expand into the dry cleaning business. Pursuant to this decision, Jeffson purchased two[6] A. P. Centers from Jacobson. These stores were located at 95th and Blue Ridge in Kansas City, Missouri (Blue Ridge store), and the Gladstone Plaza Shopping Center in Gladstone, Missouri (Gladstone store). Both stores were purchased by Jeffson from Jacobson pursuant to the purchase-resale distribution method.

Jacobson purchased the equipment for the Blue Ridge store in 1965 and executed the requisite franchise agreement at that time. The store was set up as a pilot store where potential franchisees could view the typical operation of an A. P. Center. In 1969 Jeffson purchased the Blue Ridge store from Jacobson. Jeffson assumed the balance of Jacobon's E. A. C. obligation and tendered $20,-

6 Although Jeffson purchased a total of three A. P. Centers, only two are relevant to the matters presented on this appeal. See note 3 **supra.**

000 in cash and a $16,424 promissory note to Jacobson. All of the necessary assignments were completed.

As to the Gladstone store, it had been equipped by Jacobson in 1966. Jeffson agreed to purchase the Gladstone A. P. Center by assuming Jacobson's E. A. C. obligations, paying Jacobson $24,000 in cash and giving a promissory note for $13,100. Again, all of the necessary assignment documents were duly executed.

Jeffson was awarded $52,000, trebled to $156,000 by the court, for the antitrust violations attendant to the purchase of the Blue Ridge and Gladstone stores, and attorneys' fees of $54,300. The jury denied relief on the Count II misrepresentation claim and the Count III punitive damage claim.

I. *Agency Issue.*

The initial issue raised on this appeal involves the question of whether Jacobson was an agent for defendant when he was engaging in the negotiation and sale of the A. P. Centers in this case. Plaintiffs' case is wholly dependent upon Jacobson occupying an agency status since Jacobson was the ostensible seller and was intimately involved in all transactions giving rise to the damage awards. Jacobson's agency status is indispensable to plaintiffs' fraud claims since it is contended that Jacobson made several misrepresentations while acting as defendant's agent and that the misstatements are therefore imputable to defendant. Furthermore, as to the antitrust charges, plaintiffs contend that Jacobson was acting within the scope of his agency while participating in the purchase-resale distribution procedure and that the sales to plaintiffs should be treated as direct sales from defendant.

Defendant, on the other hand, disclaims any control or influence over Jacobson's distribution activities and alleges that Jacobson was acting as an independent contractor in the A. P. Center sales. Defendant asserts that it discontinued all significant involvement in the distribution of A. P. Centers after dealers such as Jacobson became franchisees of their own A. P. Centers and that second-level sales between Jacobson and plaintiffs in this case were beyond its control. Defendant contends that the evidence is insufficient to show that Jacobson was an agent and vigorously contends that the District Court should not have submitted that issue to the jury.

The traditional formulation of what constitutes an agency relationship is as follows:

> Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

Restatement (Second) of Agency § 1 (1958); *accord, Leidy v. Taliaferro,* 260 S. W. 2d 504, 505 (Mo. 1953).

In assessing whether an individual occupies the status of an agent, it is necessary to review the facts and circumstances surrounding that individual's activities to determine whether the purported principal exerts the requisite control over the individual so as to create an agency relationship.[7] *Aetna Insurance Co. v. Glens Falls Insurance*

7 The dealership contract in this case characterized Jacobson as an independent contractor. This characterization is not controlling on the agency question. If the surrounding facts evidence an agency relationship, however "artfully disguised", the parties cannot negative its existence by representing that it is something other than an agency relationship. **Board of Trade v. Hammond Elevator Co.,** 198 U. S. 424, 437-38, 441, 25 S. Ct. 740, 49 L. Ed. 1111 (1905).

Co., 453 F. 2d 687, 690 (5th Cir. 1972). Since this determination requires the finding and weighing of numerous facts, the ultimate resolution is appropriately left to the province of the jury in most instances. *Wood v. Holiday Inns, Inc.*, 508 F. 2d 167, 173 (5th Cir. 1975); *Baker v. St. Paul Fire & Marine Insurance Co.*, 427 S. W. 2d 281, 293 (Mo. App. 1968). It is only where the facts are not in dispute and there is no real issue for the jury to resolve that the trial court should rule on the agency issue as a matter of law. *Burriss v. Texaco, Inc.*, 361 F. 2d 169, 174 (4th Cir. 1966); *Baker v. St. Paul Fire & Marine Insurance Co.*, supra at 293.

We have reviewed the extensive record in this case and conclude that, although the question is a close one, the District Court did not err in submitting the agency issue to the jury. There was sufficient evidence adduced at trial to support plaintiffs' contention that defendant exerted influence and control over significant aspects of Jacobson's distribution activities.

Prior to becoming a dealer for defendant, Jacobson had substantial experience in the dry cleaning industry. He had operated seven dry cleaning plants and some formal wear rental establishments in the greater Kansas City area. Jacobson was appointed as a dealer for defendant originally for the western counties of Missouri, but his area was later extended to cover Kansas, Oklahoma and Colorado. In performing his dealership responsibilities, Jacobson paid his own office expenses and overhead except for the supplies and forms furnished to him by defendant. At defendant's urging, Jacobson listed himself as an "Arnold Palmer Dealer" in the Yellow Pages of the

telephone directory; defendant, through A. P. C. C. S., paid one-half of the cost of that listing.

After Jacobson executed defendant's dealership contract, defendant undertook an extensive and continuous campaign through A. P. C. C. S. to direct Jacobson in the distribution of the A. P. Centers. Jacobson attended numerous sales meetings at which he was instructed as to how to complete the many A. P. C. C. S.-prepared forms.[8] Jacobson was also encouraged to distribute pursuant to the purchase-resale system and to hire salesmen to promote the sales effort. In line with this method of operation, Jacobson attempted to secure favorable locations for A. P. Centers by placing ads in the local paper. When Jacobson selected a site for a proposed A. P. Center, his selection was forwarded to A. P. C. C. S. for confirmation and at least one A. P. C. C. S. official testified that A. P. C. C. S. was empowered to instruct Jacobson that the site was unacceptable and should not be used for an A. P. Center. A. P. C. C. S. disseminated price lists which set forth the prices at which various A. P. Centers should be sold. A. P. C. C. S. also established sales quotas for its dealers which were characterized as advisory, not mandatory. However, some dealers were terminated for failing to achieve a sufficient volume of orders. A. P. C. C. S. paid a portion of

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8 In addition to training dealers in the proper way to fill out the printed forms, A. P. C. C. S. was vigilant in assuring that the forms were completed in accordance with A. P. C. C. S. standards. In 1970 A. P. C. C. S. notified dealers that the submission of contracts and supplemental documents which had been dated by dealers prior to filing "seriously endanger[ed] [A. P. C. C. S.'s] legal position." Dealers were informed that all contracts received by A. P. C. C. S. must be undated or they would be returned to the dealers.

Jacobson's advertising expenses and supplied him with brochures and other material to facilitate distribution of A. P. Centers. In 1967 A. P. C. C. S. personnel attended a franchise show in Kansas City, talked with prospective franchisees and encouraged them to purchase A. P. Centers from Jacobson. A. P. C. C. S. also provided its dealers with sales leads and prodded the dealers to submit reports as to the outcome of the contacts with these prospects.

We believe the evidence, viewed in its entirety, supplied an adequate showing of control by defendant over Jacobson's activities to justify submission of the agency issue to the jury. While there is conflicting evidence from which contrary inferences can be drawn, there is also substantial and competent evidence that supports the District Court's decision to permit the jury to resolve this issue. The evidence is not so demonstrably clear, as contended by defendant, as to command only one result. To the contrary, there is evidence from which the jury could have inferred that defendant directed and controlled Jacobson in the distribution of the A. P. Centers. We therefore accept the jury's finding that Jacobson was acting as defendant's agent when distributing the A. P. Centers to the plaintiffs and think that this finding has sufficient evidentiary support in the record.

II. *Antitrust Claims.*

Defendant assails the jury's finding that the method of distributing A. P. Centers constituted an illegal tying arrangement in contravention of § 1 of the Sherman

Act. 15 U. S. C. § 1.[9] A tying arrangement exists when a person agrees to sell one product (the tying product) only on the condition that the vendee also purchase another product (the tied product). *Northern Pacific Ry. v. United States,* 356 U. S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). The pernicious effect on competition from such an arrangement is clear. The distributor using such a method is utilizing its power and position in the tying product market to gain competitive leverage in the tied product market. Vendees desirous of purchasing the tying product are of necessity forced to abdicate their free will and purchase the tied products from the distributor of the tying product regardless of whether there are items of greater quality and less expense in the tied product market. *Times-Picayune Publishing Co. v. United States,* 345 U. S. 594, 605, 73 S. Ct. 872, 97 L. Ed 1277 (1953). Competitors in the tied product market are similarly disadvantaged since they are unable to offer their products to the consuming public on an equal basis with the distributor of the tying product. *United States v. Loew's Inc.,* 371 U. S. 34, 44-45, 83 S. Ct. 97, 9 L. Ed. 2d 11 (1962). In short, "[t]ying arrangements * * * flout the Sherman

9 In their complaints plaintiffs also contended that the tying arrangement violated § 3 of the Clayton Act. 15 U. S. C. § 14. In order to prevail under § 3, plaintiffs must establish that the tying item, the A. P. Center franchise, constitutes "goods, wares, merchandise, machinery, supplies, or other commodities." We need not, for purposes of this case, determine whether a tying arrangement involving a franchise would be cognizable pursuant to § 3 of the Clayton Act. See **Ungar v. Dunkin' Donuts of America, Inc.,** 531 F. 2d 1211, 1215 n. 4 (3d Cir. 1976). The antitrust claim was submitted to the jury solely on the basis of § 1 of the Sherman Act and plaintiffs do not urge the applicability of Clayton Act § 3 on this appeal.

Act's policy that competition rule the marts of trade." *Times-Picayune Publishing Co. v. United States, supra* at 605, 73 S. Ct. at 878.

Since tying arrangements inevitably hurt competition in the tied product market, they "fare harshly under the laws forbidding restraints of trade." *Times-Picayune Publishing Co. v. United States, supra* at 606, 73 S. Ct. at 879. Such arrangements constitute per se violations of § 1 of the Sherman Act when the evidence establishes the following essential elements: First, that an individual has actually tied two separate and distinct products into a single package, *Times-Picayune Publishing Co. v. United States,* supra at 614, 83 S. Ct. 97; second, that the individual possesses sufficient economic power in the tying product market to appreciably restrain competition; and, third, that the arrangement affects a "not insubstantial" amount of interstate commerce. *Northern Pacific Ry. v. United States, supra* at 6, 78 S. Ct. 514. If the plaintiff proves a per se violation, the tying arrangement is automatically illegal and there need not be any further judicial inquiry as to whether any unreasonable competitive effects result. *Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U. S. 495, 498, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969).

In attacking the proof relating to the first element of the per se formulation, defendant contends that its method of distribution did not involve the aggregation of two separate products. It is defendant's position that the enterprises purchased by plaintiffs constituted single, individual products in the form of "going businesses." However, a characterization ignores the realities of the situation.

A franchise license constitutes a separate and distinct marketable item. The weight of judicial authority supports the proposition that if prospective franchisees are compelled to purchase equipment or other tied products in order to obtain the franchise and trademark, an illegal tying arrangement exists. *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.,* 463 F. 2d 1002, 1012-1016 (5th Cir.), cert. denied, 409 U. S. 1086, 93 S. Ct. 688, 34 L. Ed. 2d 673 (1972); *Siegel v. Chicken Delight, Inc.,* 448 F. 2d 43, 47-49 (9th Cir. 1971), *cert. denied,* 405 U. S. 955, 92 S. Ct. 1172, 31 L. Ed. 2d 232 (1972); *see Susser v. Carvel Corp.,* 332 F. 2d 505 (2d Cir. 1964), *cert. dismissed,* 381 U. S. 125, 85 S. Ct. 1364, 14 L. Ed. 2d 284 (1965). *See generally,* Annot., 14 A. L. R. Fed. 473 (1973). We subscribe to this view. Defendant marketed a highly attractive franchise which offered the use of the Arnold Palmer name and trademark to prospective franchisees. However, the record is replete with evidence that prospective franchisees could obtain the franchise and trademark only if they also purchased the package of dry cleaning equipment and incidental materials from defendant. Therefore, defendant was marketing its A. P. Center franchises by using an illegal tying arrangement as typified in the above cases.

Defendant seeks to avoid this result by inserting dealer/agents into its distribution scheme. Defendant argues that even if direct sales from it to franchisees may constitute an illegal tying arrangement, a different result is mandated when the A. P. Centers are sold by defendant to dealer/agents who in turn make the plants operational and resell them as "going businesses". However, circumvention of the antitrust laws is not so easily achieved. Substance, not form, controls our inquiry.

United States v. Sealy, Inc., 388 U. S. 350, 352, 87 S. Ct. 1847, 18 L. Ed. 2d 1538 (1967). A distribution method which is illegal when conducted by a manufacturer is not rendered legal by the simple expedient of enlisting agents to perform the same activity on behalf of and under the control of the manufacturer. Just as a manufacturer cannot avoid the price-fixing proscription of the Sherman Act by setting up sham "agencies" to distribute its product at a set price, *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U. S. 373, 398-99, 407, 31 S. Ct. 376, 55 L. Ed 502 (1911), defendant cannot avoid antitrust liability by having agents under its direction and dominion market A. P. Center franchises pursuant to the illegal tying arrangement described above.

We stress what this case does not involve. This is not a situation where there was an isolated sale of a going business whereby the buyer was obligated to purchase the entire operational package. Rather, this case presents a deliberate distribution scheme in which dealer/agents were initially sold a package comprised of a tying product and numerous tied products and then were encouraged to distribute these "packages" to prospective franchisees. Jacobson informed prospective franchisees that they could secure the Arnold Palmer franchise only if dry cleaning equipment and other materials were purchased in conjunction with the franchise. This tying arrangement scheme using agents, as opposed to independent contractors, as conduits for the sale of A. P. Center "packages" in this fashion is contrary to the policy and principles of the Sherman Act. *Cf. Beefy Trail, Inc. v. Beefy King International, Inc.*, 348 F. Supp. 799, 806-07 (M. D. Fla. 1972).

As to the second element of proof for the per se rule, the record reflects that defendant possessed sufficient economic power in the tying product market to restrain competition. The record does not clearly reflect the full extent of defendant's power and position in the dry cleaning franchise market, although defendant is referred to by plaintiffs as the world's largest manufacturer of laundry and dry cleaning equipment. Regardless, "[t]he standard of 'sufficient economic power' does not * * * require that the defendant have a monopoly or even a dominant position throughout the market for the tying product." *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U. S. 495, 502, 89 S. Ct. 1252, 1258, 22 L. Ed. 2d 495 (1969). Sufficient economic power exists if the distributor of the tying product has sufficient leverage in the market to increase prices or to force a significant number of buyers to accept burdensome terms. *Fortner Enterprises, Inc. v. United States Steel Corp., supra* at 504, 89 S. Ct. 1252. The District Court in this case reviewed the record and concluded that defendant's franchise was unique in nature and possessed a high degree of desirability to prospective franchisees. We agree that these attributes of uniqueness and desirability, coupled with the power of defendant to impose the tying arrangement on buyers at an artificially enhanced price, constitute sufficient economic power. *Fortner Enterprises, Inc. v. United States Steel Corp., supra*; *United States v. Loew's Inc.*, 371 U. S. 38, 45, 83 S. Ct. 97 (1962).[10]

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10 Based upon the holding that the nature of defendant's product and the extent of defendant's leverage in the market compel the

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Defendant also contends that the third element of the per se rule was not established since the sales of A. P. Centers in this case were wholly intrastate in nature; thus, no interstate commerce was affected. Regardless of how local the immediate effect of an activity might be, it satisfies the jurisdictional prerequisite of the Sherman Act if the activity has a substantial and adverse effect on interstate commerce. *Gulf Oil Corp. v. Copp Paving Co.,* 419 U. S. 186, 195, 95 S. Ct. 392, 42 L. Ed. 2d 378 (1974). In determining the effect on interstate commerce, "the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimus,* is foreclosed to competitors by the tie * * *." *Fortner Enterprises, Inc. v. United States Steel Corp., supra* at 501, 89 S. Ct. 1252, 1258; *see International Salt Co. v. United States,* 332 U. S. 392, 396, 68 S. Ct. 12, 92 L. Ed. 20 (1947). Defendant marketed its franchised stores in over 30 states and, over a six year period, sold nearly $9,000,000 in equipment and other materials in association with the distribution of A. P. Center franchises. Free competition in the tied product market would have permitted numerous manufacturers, otherwise foreclosed because of the tying arrangement, to compete for a portion of the substantial market deliberately manipulated and controlled by defendant. *See Hospital Building Co. v. Trustees of Rex Hospital,* —— U. S. ——, 96 S. Ct. 1848, 48 L. Ed. 2d 388 (1976); *Burke v. Ford,* 389 U. S. 320, 88 S. Ct. 443, 19 L. Ed. 2d 554 (1967). Therefore, we agree with the District Court that a "not insubstantial" amount of interstate commerce was affected.

(Continued from previous page)

conclusion that defendant possesses sufficient economic power, we need not decide whether such economic power can be automatically presumed in all cases when the tying product is a trademark. **Compare Siegel v. Chicken Delight, Inc., supra** at 50, **with Capital Temporaries, Inc. v. Olsten Corp.,** 506 F. 2d 658, 663-64 (2d Cir. 1974).

Plaintiffs' evidence in this case inexorably indicates that defendant's tying arrangement constituted a per se violation of § 1 of the Sherman Act. However, courts have ruled that using tying arrangements as marketing devices is not unlawful if defendant advances compelling business justifications for their use. *Susser v. Carvel Corp., supra,* 332 F. 2d at 519. One such justification exists if defendant proves that a substitute for the tied product must comply with such precise and detailed specifications that other manufacturers may not be able to market a product functionally compatible with the tying product. *Standard Oil Co. v. United States,* 337 U. S. 293, 306, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949); *International Salt Co. v. United States, supra* at 397-98, 68 S. Ct. 12. Another justification is that a small company may be compelled to use tying arrangements in order to permit it to scale the high barriers of entry into a new market. *United States v. Jerrold Electronics Corp.,* 187 F. Supp. 545, 557 (E. D. Pa. 1960), aff'd per curiam, 365 U. S. 567, 81 S. Ct. 755, 5 L. Ed. 2d 806 (1961); *see Brown Shoe Co. v. United States,* 370 U. S. 294, 330, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962). Defendant does not argue that either of these justifications is applicable in this case and the evidence fails to support their application. Defendant's only asserted justification for the tying arrangement is that it is more convenient for franchisees to invest in a business enterprise in which all the necessary components are

grouped together and marketed in one inseparable package. Even if franchisees' convenience would be best served by such an arrangement, a fact which has not been independently established in this record, this alone would not provide a basis for legalizing such an anti-competitive method of distribution. We therefore conclude that there is a legal and factual basis for supporting the antitrust awards in this case.

Defendant also contends that the amount of damages awarded for the antitrust claims lacks evidentiary support. The parties concede that the measure of damages in a tying arrangement case is the amount of the overcharge, or the difference between the price paid for the tied items and the fair market value of the tied items at the time of purchase. *Siegel v. Chicken Delight, Inc., supra,* 448 F. 2d at 52; *see Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U. S. 481, 488-89, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968). Plaintiffs presented an expert witness who testified as to the fair market value of the tied A. P. Center equipment at the time it was initially purchased by the respective plaintiffs. The jury had before it the terms of the purchases by the plaintiffs. By comparing these figures, the jury could calculate the amount of the overcharge. The awards issued by the jury were comfortably within the range of reasonableness. We conclude that the jury awards did not rest on guess work or speculation but rather were adequately supported by evidence presented at trial. *Bigelow v. RKO Radio Pictures, Inc.,* 327 U. S. 251, 264-66, 66 S. Ct. 574, 90 L. Ed. 652 (1946).

III. *Fraud Claims.*

Defendant contends that plaintiffs Northern and Soper failed to present sufficient evidence to support the jury's awards on the fraud counts. The fraud counts were premised upon three alleged misrepresentations which had been made to plaintiffs by defendant or Jacobson. These allegedly false statements were: (1) a representation by Jacobson that an independent firm had conducted a national market survey to analyze the impact of the Arnold Palmer name on the dry cleaning industry; (2) defendant's statement that every A. P. Center franchise would be supported by a continuous program of local advertising at no cost to the franchisee; and (3) Jacobson's representation that the location of A. P. Centers had been analyzed by utilizing a special form prepared for the dry cleaning industry.

Missouri law, which concededly controls in this diversity cause of action, defines fraud in its traditional sense.

> The elements of fraud are a representation; its falsity; its materiality; the speaker's knowledge of the falsity or his ignorance of the truth; the speaker's intent that his statement should be acted upon by the person and in the manner reasonably contemplated; the hearer's ignorance of the falsity of the statement; his reliance on its truth; his right to rely thereon; and his consequent and proximately caused injury.

Ackmann v. Keeney-Toelle Real Estate Co., 401 S. W. 2d 483, 488 (Mo. 1966).

Defendant's primary contention is that the representations made to plaintiffs were not false. Since plaintiffs pre-

vailed on this theory at trial, we must consider the evidence and all permissible inferences which can be derived from that evidence in the light most favorable to plaintiffs and all conflicts in the evidence must be resolved in their favor. *Illinois Terminal R. R. v. Feltrop,* 130 F. 2d 982, 984 (8th Cir. 1942).

Northern and Soper presented sufficient evidence to support their claim that Jacobson misrepresented the fact that an independent firm had analyzed the impact of the Palmer name on the dry cleaning industry. Both testified that Jacobson informed them that such a study had been made and that it was determined that the Palmer name would be "good" for the dry cleaning industry for approximately 10 years. The evidence establishes that one of defendant's divisions, American Laundry Machinery Industries, and not an independent firm, conducted an investigation which disclosed that an Arnold Palmer sponsorship would be of economic benefit. Richard Lester, one of defendant's employees who set up the A. P. Center franchising system, testified that the survey did not purport to determine the value of the Arnold Palmer name in the dry cleaning industry. Furthermore, there was no evidence to support the statement that the Palmer name would retain economic viability for 10 years. The representations made by Jacobson in this regard were clearly false.

The second alleged misrepresentation relates to whether plaintiffs were informed that they would be supplied by defendant with local advertising at no cost to them. A promotional brochure distributed by defendants and reviewed by plaintiffs contained the following: "Your

Arnold Palmer Cleaning Center Franchise is backed with a strong, continuous program of local and national advertising in newspapers and magazines, on radio and television." This language gives rise to an implication that franchisees would incur no cost in local advertising campaigns promoting their A. P. Centers. Northern testified he was led to believe that there would be no charge for local advertising, relying upon the language of the brochure. Soper testified that she was informed by Jacobson that part of her franchise fee would be used by defendant to supply local advertising. However, Lester testified that defendant never intended to provide cost-free local advertising to franchisees. While plaintiffs actually received some advertising and promotional material from defendant, the cost of placing local advertisements was not assumed by defendant. We believe that there is sufficient evidence in the record from which the jury could find that plaintiffs were falsely advised that they would not have to pay for local advertising.[11]

There is also sufficient evidence to establish the falsity of Jacobson's representations in regard to the analysis of the locations of A. P. Centers undertaken by

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11 In regard to the misrepresentation that local advertising would be supplied at no cost, defendant relies heavily upon the testimony of Soper in which she stated that "[i]n '69 we had no complaints at all about what we received." Defendant contends that this is an admission that Soper was not disenchanted with the type of advertising support provided by defendant. Soper's testimony, however, related to her receipt of promotional material and advertising mats sent by defendant. She stated that, although she did not use much of the material, she had no complaints concerning the material. That statement does not foreclose her fraud claim which is premised not upon what she actually received but what she failed to receive—cost-free local advertising.

defendant. The promotional brochure sent to both Northern and Soper represented that "[defendant's] experienced representatives are experts in seeking out ideal locations and in analyzing these locations to determine their maximum business potential." While there was a location analysis form used by defendant's distributors, the form had not been developed specifically for the dry cleaning industry. Defendant's forms were of the type used for analyzing locations of gas stations, car washes and supermarkets. There was no evidence to indicate that defendant's distributors possessed any expertise in finding or analyzing the locations of A. P. Centers. We think that there is sufficient evidence in the present record from which the jury could have inferred that Jacobson had misrepresented the source and utility of the location analysis methods implemented by defendant.

Our review of the record discloses that there was sufficient evidence to establish all the requisite elements of fraud. The jury was presented with sufficient, although not substantial, evidence from which it could find that fraudulent representations had been made to plaintiffs. We also conclude that, contrary to defendant's allegations, there was sufficient evidence to support the finding that plaintiffs relied upon the false representations and suffered injury because of them. We therefore will not disturb the jury awards on the fraud counts.

IV. *Damages and Attorneys' Fees.*

Defendant also contends that the amount of actual damages awarded by the jury on the fraud counts finds no evidentiary support in the record. In Missouri the measure of actual damages for fraud "is the difference

between the actual value of the property at the time purchased and the value it would have had had the representations been true." *Salmon v. Brookshire,* 301 S.W. 2d 48, 54 (Mo. App. 1957). Although the amount of damages is not required to be measured with exactness and precision, *Dean Foods Co. v. Albrecht Dairy Co.,* 396 F. 2d 652, 661 (8th Cir. 1968), the extent of damage must be proved with reasonable certainty. *Schmidt v. Central Hardware Co.,* 516 S. W. 2d 556, 559 (Mo. App. 1974). The jury is vested with broad discretion in establishing the amount of damages as a review and weighing of facts are inherent in this process. *Gathright v. Pendegraft,* 433 S. W. 2d 299, 317-18 (Mo. 1968).

In the present case, the jury was apprised of the actual value of the A. P. Centers purchased by plaintiff's Northern and Soper since the terms of their initial purchases were placed in evidence. The testimony of plaintiffs' expert witness, Thomas Eads, provided a basis for determining the value of the property had the misrepresentations been true. While the proof of actual damage in this case could not be reduced to mathematical exactitude, plaintiffs produced the best evidence available and provided the jury with a reasonable basis for determining the extent of the loss. *Moore v. St. Louis Southwestern Ry.,* 301 S. W. 2d 395, 402-03 (Mo. App. 1957). We think the awards of $15,000 for Northern and $8,000 for Soper for actual damages are commensurate with the nature and degree of injury incurred by those plaintiffs.

The jury also awarded Northern and Soper each $100,000 in punitive damages. In Missouri punitive damages are awarded for the purpose of punishing the

wrongdoer and as an example and deterrent to others engaging in similar conduct in the future. *Chappell v. City of Springfield,* 423 S. W. 2d 810, 814 (Mo. 1968). Punitive damages are allowed only when there is a finding of legal malice. "Legal malice exists where a wrongful act is intentionally done without just cause or excuse * *." *Schmidt v. Central Hardware Co., supra,* 516 S. W. 2d at 560.

We entertain some doubt as to whether the present record provides a sufficient basis for punitive damages. However, we are aware that questions of "intent" and "malice" are more appropriately suitable for jury determination, not appellate review. Under Missouri law, "[t]he question of whether or not punitive damages shall be awarded and, if so, in what amount rests peculiarly in the discretion of the jury." *Wisner v. S. S. Kresge Co.,* 465 S. W. 2d 666, 669 (Mo. App. 1971). We shall therefore defer to the jury's implicit finding that there is sufficient legal malice to permit the awarding of a certain amount of punitive damages. However, the amount of damages, which also rests in the discretion of the jury, "must have some reasonable relation to the injury inflicted." *Wisner v. S. S. Kresge Co., supra* at 669; *see Beggs v. Universal C. I. T. Credit Corp.,* 409 S. W. 2d 719, 724 (Mo. 1966); *Schmidt v. Central Hardware Co., supra* at 560. Our review of the record in this case convinces us that an award of $100,000 to each plaintiff was disproportionate to the injuries suffered and was an abuse of discretion on the part of the jury. We think a punitive damage award of $35,000 each to plaintiffs Northern and Soper is at the outer range for punitive awards under the

factual context of this case and accordingly reduce these punitive awards to $35,000 each.

Defendant also contends that the District Court's approval of an attorneys' fee award amounting to $90,500 for the antitrust counts lacked evidentiary support, did not differentiate between counts on which plaintiffs did and did not prevail, and was exorbitant and unreasonable. The awarding of attorneys' fees rests in the sound discretion of the District Court and a party attacking an award of attorneys' fees in an antitrust case "has the burden of clearly demonstrating error as to the factual basis, or abuse as to the discretional margin, involved in [the] allowance." *Armco Steel Corp. v. North Dakota,* 376 F. 2d 206, 212 (8th Cir. 1967). We conclude that the award in this complex case was within the discretion of the District Court and rested on an established factual basis. The District Court was well aware of the counts to which the attorneys' fees related, the time spent, the complexity of the issues and results achieved. We perceive of no legal basis for disturbing these allowances.

We therefore affirm the District Court in all respects except to reduce the punitive damage awards to Northern and Soper to $35,000 each.

APPENDIX B

In the United States District Court for the Western District of Missouri, Western Division

NO. 19,978-4

JAMES E. NORTHERN and SHIRLEY NORTHERN,
Plaintiffs,

BETTY SOPER and JEFFSON INDUSTRIES, INC.,
Intervenors,

vs.

McGRAW-EDISON COMPANY,
Defendant.

JUDGMENT

This action under Count I of the complaint of Jeffson Industries, Inc., came on trial before the Court and a jury, the Honorable Elmo B. Hunter, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, and the Court entered its findings.

IT IS ORDERED AND ADJUDGED

That the plaintiff, Jeffson Industries, Inc., under Count I of its complaint recover of the defendant the sum of Fifty-Two Thousand Dollars ($52,000.00) which is trebled pursuant to the provisions of 15 U. S. C. Section 15 for a total of One Hundred Fifty-six Thousand Dollars ($156,000.00), with interest thereon at the rate of 6 percent as provided by law from this date and attorney's fees in the amount of $54,300.00 and the costs of this action.

Dated at Kansas City, Missouri, this 17th day of March, 1975.

/s/Elmo B. Hunter
Judge

In the United States District Court for the Western District of Missouri, Western Division

NO. 19,978-4

JAMES E. NORTHERN and SHIRLEY NORTHERN,
Plaintiffs,

BETTY SOPER and JEFFSON INDUSTRIES, INC.,
Intervenors,

vs.

McGRAW-EDISON COMPANY,
Defendant.

JUDGMENT

This action by Betty Soper under Counts I, II and III of her complaint came on for trial before the Court and a jury, the Honorable Elmo B. Hunter, District Judge, presiding, and the issues having been duly tried, the jury having duly rendered its verdict, and the Court entered its findings

IT IS ORDERED AND ADJUDGED

That the plaintiff, Betty Soper, under Count I of her complaint recover of the defendant, McGraw-Edison Company, Inc., the sum of Ten Thousand Dollars ($10,000.00), which is trebled pursuant to the provisions of 15 U.S.C.

Section 15 for a total of Thirty Thousand Dollars ($30,000.00) with interest thereon at the rate of 6 percent as provided by law, from this date and that Betty Soper further recover the sum of $36,200.00 as attorney's fees under Count I of her complaint, pursuant to the provisions of 15 U.S.C., Section 15 and her costs of this action.

IT IS FURTHER ORDERED AND ADJUDGED

That the plaintiff Betty Soper recover of the defendant, McGraw-Edison Company, Inc., the sum of Eight Thousand Dollars ($8,000.00) with interest thereon at the rate of 6 percent as provided by law from this date under Count II of her complaint and her costs of this action.

IT IS ORDERED AND ADJUDGED

That the plaintiff Betty Soper under Count III of her complaint recover of the defendant, McGraw-Edison Company, Inc., the sum of One Hundred Thousand Dollars ($100,000.00) with interest thereon at the rate of 6 percent as provided by law from this date and her costs of that action.

Dated at Kansas City, Missouri, this 17th day of March, 1975.

/s/Elmo B. Hunter

Judge

(Filed March 17, 1975.)

In the United States District Court for the Western District of Missouri, Western Division

NO. 19,978-4

JAMES E. NORTHERN and SHIRLEY NORTHERN,

Plaintiffs,

BETTY SOPER and JEFFSON INDUSTRIES, INC.,

Intervenors,

vs.

McGRAW-EDISON COMPANY,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ISSUES SUBMITTED FOR DETERMINATION BY THE COURT

Prior to the jury trial in this cause, and prior to the giving of the Court's instructions to the jury at the close of all evidence and argument, it was agreed by counsel for all parties to this litigation that certain questions of fact and law would be decided by the Court and that a jury determination of these questions would be waived by plaintiffs, intervenors, and defendant.

The questions agreed to be submitted for Court determination are: (1) Whether the defendant possessed sufficient economic power with respect to the "Arnold Palmer" trademark and right to use the "Arnold Palmer" name to appreciably restrain free competition in the market for drycleaning equipment, fixtures, furnishings, signs, and

backdrops; and (2) Whether a not insubstantial amount of interstate trade and commerce was affected.

Prior to submitting this cause to the jury, the Court made its preliminary determination that intervenors Betty Soper and Jeffson Industries had established sufficient economic power and a not insubstantial amount of interstate commerce affected so that the remaining issues on the antitrust claims of those intervenors were submitted for jury determination under the Court's instructions as to the law. On the evidence received, including testimony, depositions, answers to interrogatories, stipulations, and evidence directed to the Court out of the presence of the jury, the Court makes the following findings of fact and conclusions of law on the issues submitted for Court determination.

This Court has jurisdiction as to Count I of the complaint of Betty Soper and Count I of the complaint of Jeffson Industries, Incorporated under the provisions of Title 28 United States Code, Section 1337 as those claims arise under Section 1 of the Sherman Act (15 U. S. C., Sec. 1) and Section 4 of the Clayton Act (15 U. S. C., Sec. 15). This Court has jurisdiction as to the claims of James E. Northern and Shirley Northern in Counts II and III of their complaint and as to Counts II and III of the complaint of Betty Soper under the doctrine of pendent jurisdiction. United Mine Workers v. Gibbs, 383 U. S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966).

The registered trademark of Arnold Palmer including the use of the Arnold Palmer name, which was utilized by Arnold Palmer Cleaning Center Sales Division of defendant McGraw-Edison Company possessed sufficient

economic power or market control from its desirability to consumers and from the uniqueness in its attributes to force buyers of Arnold Palmer Cleaning Center franchises, including plaintiff (intervenor) Jeffson Industries, as it applies to the purchase by Jeffson Industries of the Arnold Palmer franchise store located at 95th and Blue Ridge in Kansas City, Missouri and the Gladstone Arnold Palmer franchise store located in Gladstone Shopping Center in Gladstone, Missouri, and plaintiff (intervenor) Betty Soper as it applies to the Arnold Palmer Cleaning Center in Liberty, Missouri, to buy other items including dry cleaning equipment, fixtures, furniture and to lease signs and backdrops from Arnold Palmer Cleaning Center Sales Division of defendant McGraw-Edison at prices which were higher than those same or comparable items could have been obtained for on the open market from other sources. Further, the Arnold Palmer Cleaning Center franchisees, including plaintiff Jeffson Industries on the Blue Ridge and Gladstone Arnold Palmer stores and Betty Soper on the Liberty, Missouri Arnold Palmer store did purchase the dry cleaning equipment, fixtures, furniture and lease the signs and backdrops at higher prices than those items or comparable items could have been obtained for on the open market because of their strong preference for defendant's unique and desirable registered trade name. See, Northern Pacific Ry. Co. v. United States, 356 U. S. 7-8, 78 S. Ct. 519, 2 L. Ed. 545 (1945); International Salt Co. v. United States, 332 U. S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947); United States v. Loew's Inc., 371 U. S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11 (1962); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U. S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969); Siegel v. Chicken Delight, Inc., 311 F. Supp. 847 (N. D. Cal. 1970).

The total amount of interstate trade and commerce in the sale of Arnold Palmer franchise stores by Arnold Palmer Cleaning Center Sales Division of defendant, including dry cleaning and laundry equipment, fixtures, furniture, and leases of signs and backdrops, which were tied to the defendant's registered trademark was substantial in terms of total dollar volume so as not to be merely "de minimis" and was sufficient in terms of total dollar value to foreclose competition in the supplying of said tied items from a substantial market. The total volume of all Arnold Palmer Cleaning Center franchise stores by defendant, including the sales of Arnold Palmer Cleaning Center franchise stores to Jeffson Industries at 95th and Blue Ridge in Kansas City, Missouri and Gladstone, Missouri and the Betty Soper Arnold Palmer Cleaning Center franchise store in Liberty, Missouri have been considered, and the total dollar volume of all of said sales by defendant of Arnold Palmer Cleaning Center franchise stores over some 30 states of the United States cannot be regarded as insubstantial. See Fortner Enterprises, Inc. v. United States Steel Corp., 394 U. S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969); International Salt Co. v. United States, supra; Siegel v. Chicken Delight Inc., supra.

Accordingly, in view of these findings and conclusions, judgment will enter in favor of intervenors Betty Soper and Jeffson Industries on the claims in Count I of their complaints.

/s/Elmo B. Hunter

United States District Judge

(Filed January 16, 1975)

In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-899

McGRAW-EDISON COMPANY,
Petitioner,

vs.

BETTY SOPER AND JEFFSON INDUSTRIES, INC.,
Respondents.

BRIEF OF RESPONDENTS BETTY SOPER AND JEFFSON INDUSTRIES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-899

McGRAW-EDISON COMPANY,
Petitioner,

vs.

BETTY SOPER AND JEFFSON INDUSTRIES, INC.,
Respondents.

BRIEF OF RESPONDENTS BETTY SOPER AND JEFFSON INDUSTRIES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

The only question presently before this Court is whether McGraw-Edison Company's Petition For Writ of Certiorari should be granted.

PRELIMINARY STATEMENT OF THE CASE

Respondents cannot accept the statement of the case contained in McGraw-Edison's Brief since it is not a fair and adequate statement to cover the issues.

This case involves three separate parties involved in actions against McGraw-Edison Company arising out of the purchase of Arnold Palmer Cleaning Center franchises. The original complaints were filed by James E. Northern and Shirley Northern in December of 1971. Jeffson In-

dustries, Inc. and Betty Soper were allowed to intervene in this action in the summer of 1972. Originally, the three separate cases each alleged one count of a violation of the Anti-trust laws, one count for fraud and misrepresentations of petitioner, and one count for punitive damages based on Count II-Fraud.

McGraw's Petition For Certiorari does not address any of the claims raised by the Northerns, or the verdict of the jury with respect to any of the claims for fraud and punitive damages.

THE RECORD

Respondents submitted lengthy testimony from Roy Jeffress, Betty Soper and approximately two weeks of testimony by Arnold Palmer Cleaning Center dealer, John Jacobson. In addition, respondents offered lengthy testimony by Thomas Eads, a man with in excess of 30 years experience in the sales, service and appraisal of dry-cleaning and laundry equipment and dry-cleaning businesses. Respondents also offered the testimony of Lawrence Cantrell who had in excess of 30 years' experience in all phases of sales, manufacture and appraisal value of signs and backdrops, in addition to lengthy deposition testimony of petitioner's national and regional sales managers, Richard Lester, Lincoln Bathrick and G. Richard Borcherding. Petitioner produced one witness Richard Lester, national sales manager of the APCCS Division.

On the Anti-trust counts of Jeffson Industries, Inc. and Betty Soper, it was agreed by all parties that the issues of economic power in the tying item and the issue that a not insubstantial amount of interstate commerce was affected by petitioner's tying arrangement, would be submitted to the Court. Prior to submitting this cause

to the jury, the Court made its preliminary determination that respondents Betty Soper and Jeffson Industries had established sufficient economic power in the tying item, and that a not insubstantial amount of interstate commerce was affected so that the remaining issues on the Anti-trust claims of those intervenors were submitted to the jury. (Appendix B-5)

BACKGROUND

While reluctant to unduly lengthen the record before this Court, respondents feel it is necessary to clarify some misstatement of the factual background presented by petitioner.

The Arnold Palmer Franchise program began in 1964 when Petitioner through its American Laundry Machinery Industries Division (ALMI hereafter) established a subdivision—Arnold Palmer Cleaning Center Sales Division (hereafter APCCS). Petitioner's APCCS division was established to sell Arnold Palmer Cleaning Center franchise stores. The contract for the use of the Arnold Palmer name was signed prior to any investigation of the name by petitioner. ALMI division of petitioner was also the division which developed the Martinizing franchise program, the largest, most successful dry-cleaning franchise program. McGraw-Edison's ALMI Division, at the beginning of the AP franchise program, was the largest manufacturer of dry-cleaning and laundry equipment in the world, and the primary purpose for establishment of the AP franchise program, through the use of the Arnold Palmer name, was to obtain a competitive advantage over other dry-cleaning equipment manufacturers by tying the Arnold Palmer name to the sale of dry-cleaning equipment. The Arnold Palmer Cleaning

Center franchise was based on the concept that the "Arnold Palmer" name would insure a captive presold dry-cleaning market and enable petitioner to sell dry-cleaning machinery through the use of the AP franchise at excessive, non-competitive prices. AP franchisees could obtain the AP franchise and trademark only if they also purchased the package of dry-cleaning equipment and incidental materials from petitioner. As the unanimous opinion of the 8th Circuit Court of Appeals points out:

> "the record was replete with evidence that if Betty Soper and Jeffson Industries wanted the AP name, they were required to take the full package of equipment and execute the assignment and assumption forms." (Appendix A-15)

The Arnold Palmer franchise stores were sold through dealer-distributors nationally and in Canada. The APCCS franchise concept included financing through another McGraw-Edison subsidiary—EAC (Edison Acceptance Corporation), which division financed each of the tied sales to respondents Jeffson Industries and Betty Soper.

STATEMENT OF FACTS REGARDING JOHN R. JACOBSON

Prior to his involvement in the Arnold Palmer franchise program, John R. Jacobson was a resident of the Kansas City area where he was primarily involved in sales and rental of formal wear. Jacobson also had an interest in several dry-cleaning operations. None of the APCCS franchise stores in which Jacobson was involved ever included any aspect of the formal wear business.

Jacobson first became aware of the Arnold Palmer franchise program at the annual industry-wide National

Institute of Dry-Cleaning Meeting in Atlantic City, New Jersey in early 1965. During that convention, Jacobson met with APCCS national sales manager, Richard Lester, and regional sales manager, Lincoln Bathrick, to discuss the Arnold Palmer franchise program. Shortly thereafter, Jacobson became an authorized Arnold Palmer dealer-distributor and was granted the Arnold Palmer dealership for the Western counties in the State of Missouri. Jacobson signed a dealer agreement with APCCS which imposed substantial limitation on Jacobson's activities in his Arnold Palmer dealership. After signing the dealer agreement, petitioner through its APCCS division, imposed additional limitations on the conduct of Jacobson's APCCS dealership and controlled the means and conduct by which Jacobson could sell AP franchises. Later, during the pendency of the AP franchise program, Jacobson's geographic area of distribution of AP franchises was extended to Kansas, Oklahoma and Colorado. Immediately following his appointment as an Arnold Palmer franchise dealer-distributor, Jacobson and one of his employees, Donald Dye, at the request and expense of petitioner, went to Cincinnati, Ohio, the principal office of petitioner's APCCS Division, for extensive training in sales techniques, which was provided by petitioner's national sales manager, Richard Lester, and other sales representatives. At that sales meeting in March of 1965 in Cincinnati, Lester and other sales representatives of APCCS gave an intensive program on sales techniques, the use of advertising and sales brochures, company policy on how sales were to be conducted, the use and execution of sales forms, how to fill out and complete franchise agreements, assignment forms of those franchise agreements, financial projections provided by petitioner and other matters regarding the sale of AP franchise stores. Following the national sales meeting in March of 1965, AP regional sales managers came to Kansas City

on various occasions to give further detailed instructions to Jacobson on the sales methods to be utilized in the AP franchise program. This program of intensive sales training, including national sales meetings, regional sales meetings and local visits with regional sales managers, continued during the entire term of Jacobson's tenure as an AP franchise dealer. During each of the various sales meetings, the precise sales techniques to be used by the AP dealers were reviewed in detail and the dealers, including Jacobson, were trained intensively in the preparation of the forms. Shortly after Jacobson's meeting with APCCS personnel in Cincinnati in 1965, Jacobson received a complete set of forms from APCCS for his use in selling franchises including sales brochures, assignment and assumption forms, financial projections forms with figures from petitioner, promissory note forms, location analysis forms, a sales presentation book which included package price lists and information on the equipment to be included in the AP franchise packages.

At or about the beginning of the AP franchise program and through 1971 when sales of AP franchises were discontinued by petitioner, good retail locations were difficult to obtain and the retail market in dry-cleaning machinery was extremely competitive. ALMI Division of petitioner and APCCS franchise division of petitioner were in competition with numerous other franchises and dry-cleaning manufacturers for the sale of equipment in good retail locations. Knowing the difficulty in obtaining good retail locations, petitioner encouraged its AP dealers to obtain good AP franchise locations and make lease commitments on those locations prior to finding AP franchisees. Consistent with that policy of petitioner McGraw-Edison, Jacobson was encouraged to obtain good franchise locations and place AP franchise stores into operation at those locations for later resale to franchisees when they could be

located in the Kansas City area. The sale-resale of the AP franchise stores by McGraw-Edison was implemented by the use of the various assignment and assumption forms prepared by petitioner for distributor use, all of which were forwarded to Jacobson shortly after his appointment as an AP dealer. In each of the sales to Jeffson Industries and Betty Soper, the exact same assignment-assumption form was used in each tied sale. In each tied sale to intervenor Jeffson Industries and Betty Soper, McGraw-Edison controlled the means of the sale per the documents to be used and received a continuing benefit from the sales through dealer Jacobson in the form of payments to McGraw-Edison's EAC Division and its APCCS Division in franchise payments. In addition, McGraw-Edison, through other AP dealers in other parts of the country, utilized the same sale-resale mechanism in selling AP franchises.

Consistent with McGraw-Edison's encouragement-policy for AP dealers to obtain good locations, establish AP franchise stores and later sell them to franchisees, in 1965, John Jacobson opened the first AP franchise store in the Kansas City area at 95th and Blue Ridge. Consistent with the instructions of petitioner, this AP store was to be a "demonstrator" store so that prospective franchisees could view the equipment and the total AP franchise package in operation. Later in 1966, consistent with that same policy of McGraw-Edison, Jacobson opened two other AP locations for resale in Gladstone, Missouri and in Liberty, Missouri.

Under Missouri law a person or entity purchasing property for resale is not required to pay state sales tax. Therefore, in light of the sale-resale practice of petitioner, Jacobson was not required to pay sales tax on several of the AP stores purchased for resale and he received

credit memos from petitioner on other resale franchise stores purchased because APCCS Division of McGraw-Edison recognized the tax exemption certificate and realized that Jacobson was holding those stores for resale. Consistent with this fact, APCCS' regional and national sales managers attempted to aid Jacobson in selling those three AP franchise stores, as such, at a franchise show in Kansas City in 1967. Prior to the franchise show, the regional sales manager reviewed and approved newspaper advertising of those three locations as available AP franchise locations.

In each of the sale-resales to respondents Jeffson Industries and Betty Soper, Jacobson followed exactly the same procedure as dictated by APCCS Division of McGraw-Edison and used the sale-resale mechanism (assignment-assumption forms) prescribed by petitioner. In each of the sales, the franchisees—Jeffson Industries and Betty Soper—were informed they could not have the AP name (tying item) without the execution of the assignment of the franchise-lease agreement and the assumption of the equipment note to EAC Division of McGraw-Edison. The franchise agreement and sign and backdrop lease agreement were physically attached to each other and incorporated by reference so that the assignment of the sign and backdrop lease agreement was an effective assignment of the full body of both the franchise agreement and the sign and backdrop lease agreement. On three different occasions, utilizing forms provided by APCCS Division of McGraw-Edison, and following procedures dictated by APCCS Division of McGraw-Edison, Jacobson assigned the franchise-lease agreement and assumption agreement to Jeffson Industries and on one occasion to Betty Soper. In each tied sale, the same procedure was followed and McGraw-Edison was able to effect a tying arrangement through Jacobson by use of the assignment-assumption

forms. The course of conduct of McGraw-Edison in dealing through AP franchise dealers in the sale-resale of the franchise stores to Jeffson Industries at Noland Plaza, Blue Ridge and Gladstone and the AP franchise store to Betty Soper at Liberty Landing, clearly were not isolated sales of an existing business, but part of a designed course of conduct by McGraw-Edison to sell dry-cleaning equipment and the other tied items through the power of the AP franchise.

STATEMENT OF FACTS REGARDING BETTY SOPER (LeMASTER)

E. Grant LeMaster and Betty LeMaster were interested in purchasing a small family business in 1968. At that time, they came into contact with Robert Sanders, Jacobson's sales agent for AP franchise locations. Mr. and Mrs. LeMaster met with Jacobson in 1968 to discuss the AP franchise location located at Liberty Landing, Missouri. At that time, after reviewing the sales brochures and other sales presentation materials with Jacobson, it was represented to the LeMasters that if they wanted to become part of the AP franchise program, and obtain the AP franchise location at Liberty Landing, they would be required to execute both the assignment-assumption forms provided by APCCS Division of petitioner on the equipment, and the assignment of the backdrop lease agreement. Again, Jacobson made the same representations to Mr. and Mrs. LeMaster regarding the AP franchise store, and Jacobson utilized the sales brochures in making this presentation. In the fall of 1968, the LeMasters did purchase the Liberty Landing AP franchise store and thereafter did execute the described assignment-assumption forms. The LeMasters operated the Liberty Landing AP franchise store until early 1970, when Mr. LeMaster

died. Thereafter, Mrs. LeMaster (Betty Soper) owned and operated the Liberty Landing store.

STATEMENT OF FACTS REGARDING JEFFSON INDUSTRIES, INC.

Roy and Catherine Jeffress were originally from central Missouri where Roy Jeffress was involved in agricultural businesses. The Jeffress family moved to the Kansas City area in 1963. At that time, the Jeffress family and Jacobson formed Jeffson Industries. Jeffson Industries began a chain of coin operated car washes in 1963. The primary capital expenditure in the formation of Jeffson Industries, Inc. was provided by the Jeffress family. In late 1966, or early 1967, the principals of Jeffson Industries became interested in the dry-cleaning business and Jacobson talked with Roy Jeffress on numerous occasions regarding the AP franchise program. During those meetings, Jacobson went over the various sales brochures and other sales materials provided by APCCS Division of McGraw-Edison. At that time, consistent with APCCS' sale-resale policy on AP franchise stores, Jacobson had obtained a lease commitment on a site in Noland Plaza, Independence, Missouri. Consistent with APCCS' sale-resale policy, an AP franchise store package was installed at the Noland Plaza location in the summer of 1967, and in September, 1967, Jacobson, utilizing the assignment-assumption forms provided by APCCS, and following procedures dictated by APCCS Division of McGraw-Edison, assigned the franchise-lease agreement on the Noland Plaza store to Jeffson Industries. The fact that the original franchise-lease agreement had been executed on the same day by Jacobson clearly establishes the sale-resale policy and distribution scheme of APCCS Division. On the occasion of each sale or resale of AP franchise stores by Jacobson to Jeffson

Industries, Roy Jeffress was told, if you want the AP name-franchise you must also take the prescribed package of equipment, including the sign and backdrop and other tied items. Throughout the period of sales of AP franchise packages, APCCS Division's policy of selling the franchise as a "package deal" was clear.

In late 1968, Jeffson Industries again became interested in expanding their holdings and Roy Jeffress again talked to Jacobson regarding the Blue Ridge AP store and the Gladstone AP store. In discussing the Gladstone and Blue Ridge AP stores, Jacobson again stated to Jeffress that if Jeffson Industries wanted the AP name and identification on the Blue Ridge and Gladstone stores, that Jeffson Industries would be required to execute the same assignment-assumption forms as required by APCCS Division of McGraw-Edison in the Noland Road purchase. In January, 1969, Jeffson Industries purchased the Blue Ridge AP location utilizing the assignment-assumption forms provided by APCCS. In August of 1969, again utilizing the same assignment-assumption forms, Jeffson Industries purchased the Gladstone AP franchise store. In 1971, Jeffson Industries purchased all of John Jacobson's interest in Jeffson Industries.

In each of the aforementioned sales or resale-assignments, McGraw-Edison's agent Jacobson followed the precise procedure dictated by APCCS Division of McGraw-Edison and used the same sale-resale forms prescribed by APCCS. In each of the sales, the franchisees—Jeffson Industries and Betty Soper—were informed that they could not have the AP name (tying item) without the execution of the assignment-assumption forms which included the assignment of the franchise-lease and the assumption of the equipment note to EAC Division of McGraw-Edison. Thus, on four different occasions, McGraw-Edison through

its various divisions, utilizing its agent Jacobson and the various forms, was able to effect tying arrangements with Jeffson Industries and Betty Soper. On each occasion, the exact same procedure was followed. It cannot be said that the four tied sales were isolated sales of businesses, but a designed course of conduct by APCCS Division of McGraw-Edison, through Jacobson, to sell dry-cleaning equipment and the other tied items through the power of the AP franchise name. The Noland Road tied sale by petitioner to Jeffson Industries, Inc. was not submitted to the jury and the jury verdict for Jeffson Industries applied only to the Blue Ridge and Gladstone Arnold Palmer dry cleaning franchise stores.

ARGUMENT

Response to Petitioner's Legal Contentions

Petitioner, McGraw-Edison Company, seeks to have this Court issue a Writ of Certiorari to review the judgment entered by the Eighth Circuit Court of Appeals in the above entitled action.

The only ground upon which petitioner seeks review by this Court is on spurious claims of conflict among the circuits, as to issues raised in the petition, as asserted by petitioner. Mere assertion that such a conflict exists does not provide the necessary basis for granting such petition.

Rule 19(b) of the Rules of the Supreme Court of the United States provides in pertinent part as follows:

> "A review on a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special reasons therefore. The following while neither containing nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) . . .
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . ."

McGraw-Edison Company, petitioner herein, seeks to invoke the discretionary power of this Court, to review the decision of the Eighth Circuit in this action. Petitioner relies on an alleged conflict among the circuits to assert a basis for this Court to invoke its sound judicial discretion, and review the action of the Eighth Circuit Court of Appeals.

Certiorari will be granted by the United States Supreme Court only in cases involving principles, the determination of which is of importance to the public as distinguished from the parties, and in cases where there is a real conflict of opinion and authority among the United States Circuit Courts of Appeal. *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S. Ct. 453, 95 L. Ed. 479; *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897.

Certiorari will not be granted where the case requires no general pronouncement, but merely involves its own unique circumstances. *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U.S. 430, 70 S.Ct. 226, 94 L. Ed. 236. Petitioner apparently seeks review in its petition for writ of certiorari on grounds which are unique and would apply only to this case. Petitioner does not state as grounds for its petition any issue which can be construed as a general pronouncement of an important principle of law.

No conflict among the circuits exists regarding the questions presented and the petition for writ of certiorari should, therefore, be denied.

Petitioner does not seek to resolve any conflict among the circuits, but to have this Court review the evidence adduced in this action at trial, and the inferences to be drawn from such evidence. It is clearly established that the Supreme Court will not grant a petition for writ of certiorari merely to review evidence and the inferences to be drawn from such evidence. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 58 S. Ct. 849, 82 L. Ed. 1273.

Under the caption, "Reasons For Granting The Writ", petitioner sets forth its pronouncement of the issues, and authority in support, on which it bases its petition for writ of certiorari. Respondents submit that there is no conflict among the circuits regarding the issues involved in this action and therefore no basis for this Court to accept certiorari for the reasons set forth below.

I.

No Conflicts Exist Among the Circuits As to the Application of the Per Se Rule to Tying Arrangements

Petitioner relies on *GTE Sylvania Incorporated* v. *Continental TV, Inc.*, 537 F.2d 980 (9th Cir. 1976), and *Susser* v. *Carvel Corporation,* 332 F.2d 505 (2nd Cir. 1964), to support its contention that even "if the licensing of the use of the name of 'Arnold Palmer' is a 'tying product', the resultant 'tying arrangement' does not necessarily unreasonably restrain competition." Thus, petitioner seeks to undermine and attack the basic concept of the "per se" doctrine as enunciated by this Court on numerous

occasions from and after the case of *Northern Pacific Railway* v. *U. S.*, 356 U.S. 1.

In *GTE Sylvania Incorporated* v. *Continental TV, Inc.*, supra, the 9th Circuit held that locations agreements imposed by a manufacturer, which had only a small percentage of the total market, in which many other brands were available to consumers, which gave its dealers no veto power against franchising of additional dealers in a given area, which permitted its dealers to carry competing brands, and which had no demonstrable effect on prices, volume of products available, quality, or consumer choice, and did not foreclose any consumer from substantive choice among several dealers, should have been judged under the rule of reason test rather than a test of per se illegality. The Court went on to say that implicit in the application of a per se rule is the conclusion that the particular practice necessarily involves an unreasonable restraint upon competition, and thus can conclusively be presumed to be illegal. Nowhere in the extensive opinion of the Ninth Circuit is the per se doctrine as applied to tying cases rejected. Specifically at footnote 34 the Ninth Circuit quotes the opinion of the Court in *White Motor Co.* v. *United States*, 372 U.S. 253, 265-266, 83 S. Ct. 696, 9 L. Ed. 2d 738:

> "Specifically, the per se rule of prohibition has been applied to price fixing agreements, group boycotts, *tying arrangements*, and horizontal division of markets. As to each of these practices, experience and analysis have established the utter lack of justification to excuse its inherent threat to competition." (Emphasis added)

Susser v. *Carvel Corporation,* 332 F.2d 505 (2nd Cir. 1964), the second case relied on by petitioner, did involve

claims of an illegal tying arrangement. The Court held that plaintiffs could not establish a per se violation of the anti-trust laws, when they failed to establish the franchisors' market dominance or that a substantial amount of commerce was affected. The Court in *Susser* did not question the validity of the per se rule where the elements of a per se violation have been established, as is clearly the situation in this case.

Tying arrangements constitute a per se violation of §1 of the Sherman Act where the evidence establishes certain essential elements:

(1) That an individual has actually tied two separate and distinct products into a single package. *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 614.

(2) The individual possesses sufficient economic power in the tying product market to appreciably restrain competition. *Northern Pacific Ry.* v. *United States,* 356 U.S. 1

(3) Finally, that the arrangement affects a "not insubstantial" amount of interstate commerce. *Northern Pacific Ry.* v. *United States,* supra.

Where the evidence establishes these essential elements, the plaintiff has proved a per se illegal violation, and there need not be further judicial inquiry as to whether any unreasonable competitive effects result. *Northern Pacific Ry. Company* v. *United States,* supra; *Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U.S. 495.

The Eighth Circuit clearly found present in this action evidence which established all of the elements of a tying arrangement, which have historically been considered a per se violation. See Opinion of the Eighth Circuit, Appendix page A-19:

"Plaintiffs' evidence in this case inexorably indicates that defendants' tying arrangement constituted a per se violation of §1 of the Sherman Act."

No conflict among the circuits exists as to the application of the per se rule in tying arrangements, and the resulting anticompetitive effects of such illegal arrangements. Petitioner cites no authority which supports this Court's undermining the "per se" doctrine as it applies to "tying arrangement" cases.

II.

The Individual Must Possess Sufficient Economic Power in the Tying Product to Appreciably Restrain Competition; No Prior Relationship to the Product Need Be Established

Petitioner's second contention is wholly *erroneous.* It appears that petitioner asserts that in order to constitute a violation of §1 of the Sherman Act the trade name of a franchise must have a prior relationship to the equipment or product to be sold. This contention is totally without legal authority or merit.

All that is necessary, as set forth previously, with regard to the tying product, is that the individual possess sufficient economic power in the tying product to appreciably restrain competition. *Northern Pacific Ry.* v. *United States,* supra. It is clear that the trial court and the Court of Appeals found that the Arnold Palmer trademark was a separate item and that petitioner possessed sufficient economic power in the AP name to restrain competition. (Appendix A-17)

Apparently, petitioner seeks to have this Court draw the inference, from the evidence or as a matter of law, that McGraw-Edison did not have such economic power.

Such a position is not in accordance with governing legal principles or the facts as determined upon review of this action by the Eighth Circuit Court of Appeals.

This Court will not grant a petition for a writ of certiorari merely to review the evidence or the inferences to be drawn from the evidence. *General Talking Picture Corp.* v. *Western Electric*, supra.

III.

Proof That Purchase of One Product Was Conditioned Upon the Purchase of Another Constitutes Coercion

McGraw sets forth as a basis for granting of its petition for a writ of certiorari the claim that there was no proof of individual coercion, and that this is in conflict with other circuits.

In support of that contention petitioner cites *Ungar* v. *Dunkin Donuts of America, Inc.*, 531 F.2d 1211 (3rd Cir. 1976) and *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976).

Ungar v. *Dunkin Donut of America, Inc.*, supra, involved an interlocutory appeal under §1292(b) of Title 28, United States Code, from a class certification by the District Court. In rejecting the District Court's certification of the class, the Third Circuit held that the certification of the class with respect to the tying claims was expressly premised on its erroneous rejection of the individual coercion doctrine. Such doctrine requires each member of the "franchised class" to prove that his purchases were "coerced", as an essential element of establishing a case of illegal tying. The Court in *Ungar*, at page 1224 set forth the principle as follows:

> "But in the absence of a formal agreement a plaintiff must establish in some other way that a tie in was

> involved and not merely the sale of two products by a single seller. This can be done by proof that the purchase of one product, the tied product, was not voluntary, i.e., by proof of coercion."

Simply put, the Third Circuit in *Ungar* held that a voluntary purchase of two separate products from a single seller does not constitute an illegal tying arrangement.

So long as the buyer is free to take either product by itself there is no illegal tying arrangement. *Northern Pacific Ry.* v. *United States*, supra, 356 U.S. at page 6.

As this Court held in *Times-Picayune Publishing Co.* v. *United States*, supra:

> "By conditioning his sale of one commodity on the purchase of another, a seller *coerces* the abdication of a buyer's independent judgment as to the tied product's merits and insulates it from the competitive stresses of the open market."

In *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, supra, the Fifth Circuit held with respect to the tying claim the franchisees failed to introduce sufficient evidence to establish their decision to purchase two separate products from a single franchisor was *coerced*.

Coercion in this context relates to voluntariness as opposed to actual force. Proof that the purchase of one product was conditioned upon the purchase of another is sufficient evidence to show coercion. See *United States* v. *Paramount*, 68 S. Ct. 915 wherein the Court held:

> "We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted."

The Eighth Circuit clearly held that the purchase of the Arnold Palmer trademark was conditioned upon the purchase of the tied product. From the opinion of the Eighth Circuit as set forth in the Appendix at page A-15:

> "However, the record is replete with evidence that the prospective franchisees could obtain the franchise and trademark only if they also purchased the package of dry-cleaning equipment and incidental materials from defendant."

Petitioner's contention in this respect is wholly without merit. Not only did the Eighth Circuit find coercion, but this case presents no conflict among the circuits on this issue.

IV.

Scheme of Distribution Involving Sales of Tied Products Constitutes a Violation of the Anti-Trust Laws

Finally, petitioner contends that the sale of an "existing facility" including equipment tied to the right to use a franchised name does not constitute an illegal tying arrangement. Petitioner relies on *Beefy Trail, Inc.* v. *Beefy King International, Inc.*, 348 F. Supp. 799 (M.D. Fla. 1972).

No conflict exists among the circuits as to the holding in *Beefy Trail,* which is totally consistent with the decision in this action. In fact, the Eighth Circuit correctly noted that the entire holding in *Beefy Trail* specifically condemned the exact practices used by petitioner in the transactions with respondents. (Appendix A-15, 16)

In fact, all the circuits which have considered this question have cited the *Beefy Trail* case, and held as did the Eighth Circuit in this case. This consistent finding

is clearly reflected in *Carpa, Inc.* v. *Ward Foods, Inc.*, 516 F.2d 39 (5th Cir. 1976) which demonstrates that no conflict exists between the Fifth Circuit and the Eighth Circuit, as to this issue. *Carpa* was an action by seafood restaurant franchises to recover damages for an alleged tying arrangement. Defendant therein contended that certain work done, and equipment ordered, prior to the plaintiffs' involvement were necessarily part and parcel of the franchise itself. In support of their argument the defendant in *Carpa* cited *Beefy Trail,* which involved the sale to a franchisee of a completely equipped restaurant which had been in operation more than six months. The district court held that such a sale in "*isolation*" did not constitute a tying arrangement (emphasis added). In *Carpa,* the Court of Appeals pointed out that *Beefy Trail* went on to hold at page 807:

> "Although an isolated sale of equipment located in an established restaurant does not constitute a tying arrangement, a different situation might exist under the circumstances where the franchisor by an intentional course of conduct seeks to circumvent the anti-trust laws concerning tying arrangements by requiring a franchisee to purchase a restaurant and its equipment previously established. . ."

The Fifth Circuit found, that had franchisees executed agreements before the first nail was ordered, each would have been required to obtain the same items they eventually received. The Court in *Carpa* went on to say at page 46:

> "This is precisely the practice condemned in Beefy Trail."

And this is precisely the practice condemned by the Eighth Circuit in the present action. Judge Gibson noted in his opinion as set forth in the Appendix page A-4:

> "Favorable locations for AP Centers were hard to find and, since a dealer had not always secured a willing buyer of a franchise when a good location became available, APCCS encouraged Jacobson and other dealers to utilize a purchase-resale procedure as a method of distributing AP Centers. Pursuant to this procedure, a dealer would select a favorable location for an AP Center and secure confirmation of his selection from APCCS. Upon confirmation, the dealer would personally execute a lease for the location. The dealer would then enter into a franchise agreement with APCCS, which authorized the dealer to use the name 'Arnold Palmer' in association with the dry-cleaning business for a period of five years. Finally, the dealer would execute a Sign and Backdrop Lease Agreement with APCCS which permitted the dealer to place a large 'Arnold Palmer Cleaning Center' sign on the exterior of the building and to use a specially designed backdrop in the interior. The dealer would also arrange to make the AP Center operational by purchasing all equipment from APCCS at dealer's cost. In most instances the dealer would finance the equipment purchase through Edison Acceptance Corporation (E.A.C.), which, like APCCS, was a subsidiary of defendant McGraw. The dealer would thereafter attempt to sell the AP Center as a 'package deal' to prospective franchisees . . ."

An isolated sale of an existing facility is not involved in this litigation. What is involved is a franchise distribution system designed by petitioner, wherein petitioner encouraged a sale-resale transaction. From the opinion of the Eighth Circuit at (A-16):

> "We stress what this case does not involve. This is not a situation where there was an isolated sale of a going business whereby the buyer was obligated to purchase the entire operational package. Rather, this case presents a deliberate distribution scheme in which dealer/agents were initially sold a package comprised of a tying product and numerous tied products and then were encouraged to distribute these 'packages' to prospective franchisees."

No conflict exists among the Circuits as to this issue. It is the substance of the transaction, not its form which will govern its legality or illegality under the anti-trust laws. *United States* v. *Sealy, Inc.*, 388 U.S. 350, 352; *Simpson* v. *Union Oil Company*, 396 U.S. 13.

CONCLUSION

McGraw-Edison's Petition for Writ of Certiorari should be denied for the reason that no issue exists, in this litigation, upon which there is a conflict of opinion among the Circuits, Petitioner's contentions in this respect are erroneous and without factual or legal justification. Further, there is no other reason which warrants this Court's granting the Petition for Writ of Certiorari.

WHEREFORE, Respondents respectfully request this Court to deny the Petition for Writ of Certiorari herein.

Respectfully submitted,

JACKSON & SHERMAN
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CERTIFICATE OF SERVICE

This is to certify a copy of the above and foregoing was mailed this 25th day of January, 1977 to Malcolm D. Young, 1500 City National Bank Building, Omaha, Nebraska and Jerome F. X. Waterman, 812 Midland Bank Building, Kansas City, Missouri, attorneys for Petitioner.

PAUL L. WICKENS

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TABLE OF CASES

OTHER AUTHORITIES

In The

Supreme Court of the United States

October Term, 1976

No. 76-899

McGRAW-EDISON COMPANY,

Petitioner,

vs.

BETTY SOPER and JEFFSON INDUSTRIES, INC.,

Respondents.

PETITIONER'S REPLY BRIEF

I.

INTRODUCTION

The Respondents' Brief in Opposition claims a misstatement of the facts presented in the Petition and raises the question that no issue of broad public significance is involved in this litigation.

II.

THE FACTS

The issues raised by the Petition pertain only to the application of the Sherman Act and involve only the named Respondents. The issues with respect to fraud, misrepresentation, and punitive damages (erroneously decided below, in Petitioner's opinion) are not raised here because not of such national import as to warrant the Court's attention.

The Petitioner recognizes the Court's concern is not with a review of the facts. However, while reaffirming its own statement, Petitioner questions Respondents' statement as being colored, if not distorted, to fit the version necessary for them to prevail in the Court below.

A few examples of such distortion appear in their Brief in Opposition which

misquotes the Eighth Circuit Court of Appeals on page 4;

states on page 4 that ". . . EAC (Edison Acceptance Corporation) . . . financed each of the tied sales to respondents Jeffson Industries and Betty Soper." when in fact in each sale, the Purchaser assumed existing Jacobson contracts;

states on page 7 that "Under Missouri Law a person or entity purchasing property for resale is not required to pay state sales tax. Therefore, in light of the sale-resale practice of petitioner, Jacobson was not required to pay sales tax . . ." when in fact, sales tax was paid. (Blue Ridge (later Jeffson) Appeal Appendix VI, pages D285 and D287, Gladstone (later Jeffson) Appeal Appendix VI, page D108); and Liberty Landing (later Soper) page 6 of Defendants' Exhibit DX296, the first page of which is shown at page D107 of Appeal Appendix VI.)[1]

refers throughout to the elaborate training dealers received in the use of the "assignment-assumption" agreements as selling devices and the great importance placed on their execution at the time of a "resale", when in fact no mention of the agreements was made in the Jeffson sales contracts; and in the Soper sale, forms were not even requested until two months after possession had been given. (Blueridge (Jeffson), Appeal Appendix VI, Page D55; Gladstone (Jeffson), Appeal Appendix V, Page 54; Liberty Landing (Soper), Appeal Appendix VI, Page D293.)

III.

THE PUBLIC ISSUE: CAN A TRADEMARK BE A "TYING PRODUCT" UNDER THE PER SE DOCTRINE?

Respondents contend that no issue involved herein is of interest to any other than the parties to this proceeding.

The Petitioner, while reaffirming its position that the cases cited support in principle its assertion that a conflict between the Circuits exists, suggests that implicit in these issues is the assumption that a trademark can on analysis

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1 "Appeal Appendix" refers to the Appendices included in the certified transcript of the record in the Court of Appeals.

be equated to land (as in *Northern Pacific Ry. v. United States,* 356 U. S. 1) or other tangibles, be considered a "tying product", and under the *per se* rule make possible an illegal tying arrangement for which damages can be assessed without proof of an unreasonable restraint of trade.

Petitioner contends it is error to treat a trademark as a "tying product;" wrong in theory and wrong in result.

The Federal Trade Commission (in *Carvel Corp.,* (1965-1967 Transfer Binder) Trade Reg. Rep. Section 17,298 at 22,425 (FTF 1965)) held in its analysis of the economics of the Carvel franchise agreements (the same franchise situation as in *Susser v. Carvel Corp.,* 332 F. 2d 505 (2d Cir. 1964)):

> "Carvel's franchise agreements cannot be regarded as tie-in arrangements because the trademark license conceptually cannot constitute a 'tying' product and, even if it could, it could never be regarded as a separable 'product' apart from the mix and commissary items to which it is attached. . . ."

The Tenth Circuit in *Redd v. Shell Oil Co.,* 524 F. 2d 1054 (10th Cir. 1975) held:

> "The trial court was then in error in considering the trademark as a separate product sold under a tying arrangement."

The Third Circuit in *Ungar v. Dunkin' Donuts of America, Inc.,* 531 F. 2d 1211 (3rd Cir. 1976) (cited in the Petition), a highly perceptive opinion, reversed the District Court on other grounds, but stated:

> "The district court decided however that the trademark, system and logo did constitute a separate tying product sufficient for purposes of the Sherman Act. We do not consider that decision an obvious one." and on page 1216, "Suffice it to say the matter is not free from doubt."

If a trademark is a tying product, when does it become so? At inception? or after wide advertising and promotion? Was the trademark of the McDonald hamburger chain unique when its first outlet was opened? If not, when? At inception could the Chicken Delight name have been associated with poultry feed? At what point with fried chicken?

The Eighth Circuit's decision holding a trademark to be a "tying product" results in f r u s t r a t i n g the objectives of the Sherman Act by reducing rather than increasing overall competition, and threatens the existence of a huge segment of American retailing industry if allowed to remain as a precedent.

Businesses operating under franchise agreements in 1976 accounted for an estimated $190 billion in sales of goods and services, constituting approximately 28 percent of all retail sales. Operating through 457,695 establishments, they employed an estimated 3½ million persons. (U. S. Department of Commerce *Franchising in the Economy 1974-1976.*)

Such businesses with few exceptions, use trademarks licensed by franchisors, on which their advertising and promotional efforts are based. Such trademarks are obviously under the complete control of the franchisor and are therefore automatically a "tying product" under the authority of the Eighth Circuit's decision. Their use, when conditioned on some economic restriction in the franchise agreement designed to advertise the trademark

or to compensate for the use of the trademark or to establish a uniformity between franchisees or to protect the trademark or for any other good business reason, creates a *per se* situation that exposes the franchisor to treble damages regardless of the reasonableness of the restriction.

In this case, Petitioner, selling in the highly competitive market for dry cleaning machinery, proceeded to promote and sell as a package all items necessary for an inexperienced individual to start and successfully operate a business of his own—a dry cleaning establishment. Essential to this objective was the initial "grand" opening promotion which came as a part of the package geared to the Arnold Palmer name. To protect and maintain the trademark and to provide uniformity among the various stores and to reinforce its advertising for the benefit of all the franchisees, the same sign and interior backdrop were leased as a part of each package.

The right to use the Palmer name and to receive the benefits of the promotion and advertising were included in the franchise. The sign and backdrops advertised the Arnold Palmer name and provided uniformity among the franchisees.

To hold that the license to use the Arnold Palmer name was separate and distinct from the signs and backdrop and imposed such burdensome terms in compelling the use of the signs and backdrop (as the jury was instructed, Appeal Appendix II, Page 342) as to warrant treble damages makes no economic sense.

The end effect of such improper enlargements of the Supreme Court's prior decisions is illustrated by the widely cited case of *Chicken Delight*. (*Siegel v. Chicken Delight, Inc.*, 448 F. 2d 43 (9th Cir. 1971), *cert denied,* 405 U. S. 955, 92 S. Ct. 1172, 31 L. Ed. 2d 232 (1972).)

Chicken Delight, Inc., a prosperous, viable franchise system, in business over 18 years had over 800 franchisees mostly successful whose franchises on resale were bringing $40,000.00 each. Following the decision of the Ninth Circuit in a class action suit brought by a half dozen franchisees, which held that the trademark was a tying product, the case was settled for $2,500,000.00. Out of the settlement after attorneys fees, each franchisee received less than $2,000.00 each. The result of this successful lawsuit was the end of that franchise system, the end of the franchises and the elimination of a large effective competitor in the fast food field.[2]

With effects such as these, the *per se* doctrine so extended and applied needs review and the law brought in line with experience and economic reality.

IV.
CONCLUSION

For the foregoing reasons and for those advanced in the Petition, the writ should be granted.

Respectfully submitted,
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2 Telephone conversation with Mr. A. L. Tunick, founder of Chicken Delight, December 12, 1976.

CERTIFICATE OF SERVICE

I, William C. Ramsey, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari on counsel for Respondents, by depositing same in the United States mail, postage prepaid, on February 10, 1977, addressed to Joseph A. Sherman, Paul A. Wickens and Patrick Lysaught, Suite 820, Home Savings Building, 1006 Grand Avenue, Kansas City, Missouri 64106 and upon Sheridan Morgan, Two Crown Center, Suite 400, 2420 Pershing Road, Kansas City, Missouri 64108, counsel for Respondents.

WILLIAM C. RAMSEY